Supreme Court of the United States

OCTOBER TERM, 1948.

No. 674

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

against

JAMES DEAN, GEORGE CICIC,
ALFRED J. WAYNE, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT OF THE PETITION.

Norman S. Hardaway,
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New York, N. Y., March 26, 1949.

Parkside Press, Inc., 32 Thomas St., New York 7, N. Y., CO. 7-0

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1. The petitioner, Waterman Steamship Corporation, prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit (R. 104) entered December 27, 1948 affirming a final decree of the District Court of the United States for the District of Maryland (R. 2-4) in a cause in admiralty, in salvage, decreeing an award of $45,100 to the respondents, James Dean *et al.*, part of the complement of the Steamship *Furnifold M. Simmons* which freed the petitioner's Steamship *Fairisle* from a strand on the east coast of India on September 5, 1946.

Lower Court opinion (R. 106-103) reported, 171 Fed. (2d) 408; District Court opinion (R. 4-19), 76 Fed. Supp. 27.

Jurisdiction

2. The judgment below was entered December 27, 1948. The jurisdiction of the court is provided by 28 U. S. C. 1254(1).

SUBJECT MATTER

Extent of the Review Sought

3. Review of the judgment below is sought only insofar as it sanctions the district court's increase of a salvage award expressly on matter which was not in the record or otherwise before the court and which should not be considered, according to long established principles of this court. The review requested raises only a question of law. No question of fact is involved.

The Nature of the Question

4. The district court, in fixing the award, said:

> "We are influenced to a considerable extent by the present depreciated value of the dollar, and by the fact that in considering and applying, as precedent, the early decisions it would be appropriate, if given precisely the same circumstances today as are disclosed in those cases, to make a considerable increase in the awards there made" (R. 12).

The Court of Appeals observed that the amount of the award by the district court was increased for the above reasons (R. 100); overruled the petitioner's assignment of error directed to that action of the district court and ruled that the question was settled in *The Kia Ora,* 252 Fed. 507, where the same court, in fixing an award, had "stressed the

rise of the general price level as one of its reasons for increasing the award of the district court'' (R. 103).

The well-defined elements to be taken into account in fixing a salvage award, as established in *The Blackwall,* 77 U. S. 1, have long been applied by the admiralty courts. The lower court has specifically innovated the doctrine that in determining a salvage award it is proper to increase the award because of depreciation of the United States dollar.

Such depreciation of the dollar is an incompetent factor and its consideration violates the fixed principles controlling the determination of a salvage award even if depreciation of the dollar were in evidence in the cause.

Question Presented

5. Should the share of the value of the salvaged property which would otherwise be awarded to the salvors be increased by reason of a depreciation of the United States dollar particularly when any such depreciation is presumably reflected in the inflated value of the property salvaged?

Reasons for Granting the Petition

6. The Court of Appeals for the Fourth Circuit has approved, and declared as settled, a doctrine of salvage services which violates fundamental and established principles of the law of salvage in admiralty and which is of such importance to owners and underwriters of vessels and cargo in all water-borne transportation that it should be reviewed and corrected by this court in the exercise of this court's power of supervision.

7. A *writ of certiorari* should be granted, to the end that the cause be reviewed by this Court and remanded to the

lower court, if this Court see fit, with directions to remit it to the district judge for recomputation of the salvage award uninfluenced by his conception of the depreciated value of the dollar at the time of judgment.

Respectfully submitted,

ROBERT S. ERSKINE,
Counsel for Petitioner.

EUGENE F. GILLIGAN,
Of Counsel.

New York, N. Y., March 25, 1949.

BRIEF IN SUPPORT OF THE PETITION

ARGUMENT

The main ingredients for determining a salvage award were defined by this Court in *The Blackwall,* 77 U. S. 1, as follows:

> (1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued." P. 14.

These well-defined elements have long been used as guides by the courts (R. 101). *The Niels Nielsen,* 277 Fed. 164 (2 C. A.); *The Flottbek,* 118 Fed. 954 (9 C. A.); *The Livietta,* 242 Fed. 195 (5 C. A.).

A suit for salvage has been held by this Court not to arise out of tort; that it may be founded on contract, but does not necessarily depend upon contract, express or implied. *United States* v. *Cornell Steamboat Company,* 202 U. S. 184, 190. The pronouncement of this court in *The Blackwall,* 77 U. S. 1, is also long established, and followed, that

> "Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a *quantum meruit,* or as a remuneration PRO OPERE ET LABORE, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property." P. 14.

The value of the salved vessel or property and the salving vessels are important evidentiary elements to which an award necessarily has direct relation, for a salvage award is, in a sense, the award of a share in the thing salved. This court, in *Oelwerke Teutonia* v. *Erlanger & Galinger,* 248 U. S. 521, in dealing with a salvor's claim that their expenses were not given sufficient consideration, said:

> "* * * But, as was pointed out by the court below, the cost was their affair. There was no contract and no request. They went into a speculation and their only claim *is a lien upon goods that they have rescued for a share in the saving that they have made for the owners.* * * *." P. 524. (Italics ours.)

The principle is the same where, as here, the salvors acted with the approval and consent of the vessel salved. The proved dollar values of the salved and salving vessels (R. 7), and the other recognized ingredients which are considered in determining an award, are all-sufficient. A due share of the dollar value of the property salvaged is given.

Depreciation in the value of the United States dollar reflects a shrinkage of buying power which, in turn, reflects *inflated* values of property. Therefore, if upon analysis of elements of salvage laid down in *The Blackwall* case an award in earlier years would have been "x" of the value of the salved property, The same award would be proper in any similar case, despite any depreciation of the dollar because that depreciation would be off-set by the greater number of dollars realized from the inflated value of the salvaged property.

What the lower court and the district court did herein (R. 12, 100, 103) was to give to the salvors a reflection of

the depreciated value of the dollar twice. That works injustice to the petitioner here, the owner of the salved vessel; in another case where dollar value is considered appreciated, application of the lower court's erroneous theory would then work injustice to the salvors.

There can be no question that the salvage award is to be measured as of the time of the completion of the services. *The Neshaminy,* 228 Fed. 285, 289 (3 C. A.); *The Magnolia,* 253 Fed. 400 (Cal. N. D.); *The Lowther Castle,* 195 Fed. 604, D. C., N. J.; *The John I. Brady,* 109 Fed. 912, E. D. Pa.; *Canadian Government Merchant Marine, Limited,* v. *U. S.,* 7 Fed. (2d) 69 (2 C. A.). The latter case is especially significant.

The court had under consideration in that case the assessment of a salvage award for the beaching and flooding of a burning steamer. The salved vessel's sound value prior to the fire was great but ship values dropped very sharply after the salvage event and before judgment. The court, in assessing the award, concerned itself only with the salved value of the vessel at the time of the salvage and stated that it wholly disregarded the sharp drop in ship values subsequent to the salvage event. (P. 70).

Its unsoundness is apparent in considering its application in other similar situations. For example, if the owner of cargo negligently damaged in sea carriage which entitles him to a recovery of the difference between the sound market value of the goods at destination and their value in damaged condition there, he would be entitled under the lower court's theory to collect in judgment an amount more than his proved damage, if at the time of judgment the court considered that "dollar" value was then depreciated.

Conclusion.

It is submitted that the error of law of the lower court is one of substance. If not corrected, it will seriously affect the right of owners and underwriters of vessels and cargo as well as the right of salvors in one of the most important phases of the water-borne commerce of the world. For the foregoing reasons and the considerations stated in the petition herein, we submit that this Court should exercise its supervisory power and grant the petition submitted herewith.

Respectfully submitted,

Robert S. Erskine,
Counsel for Petitioner.

Eugene F. Gilligan,
Of Counsel.

New York, N. Y., March 25, 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

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WATERMAN STEAMSHIP CORPORATION,
Petitioner,

vs.

JAMES DEAN, GEORGE CICIC, ALFRED J. WAYNE, ET AL.,
Respondents.

ANSWER AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

I. DUKE AVNET,
Attorney for Respondents.

JOHN P. McKINLEY,
Of Counsel.

The Daily Record Co., Baltimore 3, Md.

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

The respondents, James Dean, George Cicic, Alfred J. Wayne, Garfield Ruben, Leonard Bodden, Clarence W. Hawkins, E. J. Robertson, Richard Z. McKendree, Marion B. Nicholas, Henry V. Walesky, Leonard T. Prins, Robert C. Harrell, Robert R. Lewis, Orvell C. Waldren, Samuel L. Jacobs, Martyn C. Oille, Roberto Espada, Earl N. Forbes, Richard Powell, Shevi Koncagul, Martin A. Abdon, Simeon Masangya, Johns Graffoguini, Sullivan V. Cousins, Harold H. Evans, Irving J. Melton, Hans M. Andersen, Emmett H. Callahan, Robert L. Decker, Frank R. Young and Guy T. Horner oppose the petition of Waterman Steamship Corporation for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

STATEMENT OF THE MATTER INVOLVED

This case involves the amount to be allowed four officers and twenty-seven unlicensed members of the crew of S.S. FURNIFOLD M. SIMMONS for their successful salvage services to the S.S. FAIRISLE which was rescued after it had gone aground in the Bay of Bengal off the east coast of India on August 28, 1946 (R. 47-51). The FAIRISLE was a steel cargo steamer with a crew of 44 men and her fair salvage value was $943,875 (R. 19). The SIMMONS was a Liberty vessel valued at $544,506 (R. 19). The SIMMONS sped to the rescue from Calcutta, India, a distance of about 300 miles and devoted from August 28, 1946 to September 5, 1946 to the rescue of the FAIRISLE (R. 53, 63, 66-84). These were dangerous waters due to the prevalence of tropical cyclonic storms and because of rocks jutting up out of the water about ½ to 1 mile away (R. 60, 62, 64, 65, 66, 69, 70, 71, 81, 85-91). The lines which were made fast between the vessels parted numerous times (R. 55, 72-79); crew members of the SIMMONS were beached when their life-boat, which was being used to run lines between the vessels, became swamped with water due to the heavy surf (R. 56, 58, 62, 63, 75-77, 81-83, 91-94); and other vessels which sought to help the FAIRISLE left despairing of success (R. 63, 72-74). Even the FAIRISLE wired the SIMMONS that the latter's efforts could not be successful (R. 59, 63, 64, 92, 93). Nevertheless, the SIMMONS' crew successfully rescued the FAIRISLE.

After a full trial on the merits, the U. S. District Court for the District of Maryland awarded the respondents $45,100 and apportioned this award among the respondents in accordance with the risks assumed by each (R. 3, 4). The United States Court of Appeals for the Fourth Circuit affirmed this award.

The District Court did mention that one of its items of consideration in determining the award was the depreciated value of the dollar (R. 12) and it is this point which the petitioner now raises as the basis for its application for a writ of certiorari.

THE QUESTION PRESENTED

Did the District Court err in considering the depreciated value of the dollar when it made its award for salvage to the crew members of the rescuing vessel?

REASONS FOR OPPOSING THE GRANTING OF THE WRIT

This question above which is raised by petitioner presents no special or important reason why this Honorable Court should grant review by writ of certiorari. There is no basic departure from nor is there any innovation introduced into the established principles by which salvage awards are determined. The amount of the award is in the sound discretion of the court and although there are general principles to guide the court there are no inflexible or unchanging rules or doctrines which control the court in fixing the amount of the award. The basic concept of salvage is to reward the salvors and to encourage them and others in the future to incur risks in saving life and property on the high seas. The question presented by petitioner does not pose any act of the District Court in conflict with this well settled doctrine.

Respectfully submitted,

I. DUKE AVNET,
Attorney for Respondents.

JOHN P. MCKINLEY,
Of Counsel.

Baltimore, Maryland,
April 13, 1949.

IN THE

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BRIEF OPPOSING THE GRANTING OF THE WRIT OF CERTIORARI

ARGUMENT

The principle of salvage is well expressed in *Hughes on Admiralty*, Sec. 62, as follows:

> "A salvor who rescues valuable ships or cargoes from the remorseless grasp of wind and wave, the cruel embrace of rocky ledges or the devouring flames, need prove no bargain with its owner as the basis of recovering a reward. He is paid by the courts from motives of public policy; paid not merely for the value of his time and labor in the special case, but a bounty in addition, so that he may be encouraged to do the like again."

There is no yardstick or micrometer which can be used to accurately measure the value of a salvage service. Each

salvage case has its own peculiar circumstances and the amount of the award is largely a matter of judicial discretion. See e.g. *The Sybil*, 4 Wheat. 98, 4 L. Ed. 522. There are certain factors which the court may consider in helping it to arrive at its award but these are purely guides and are not considered as mandates. See e.g. *Steamer Avalon Co. v. Hubbard S.S. Co.*, 255 F. 894; *The Sandringham*, 10 F. 556, 5 Hughes 316; *The Blackwall*, 10 Wall. 1, 12, 19 L. Ed. 870; *Hughes on Admiralty*, Sec. 65.

The Court may in the exercise of its discretion, when fixing the amount of an award, consider the depreciated value of the dollar in order to make the bounty a fair one. In the case of the *Kia Ora*, 252 F. 507, 511 (1918), decided by the U. S. Court of Appeals for the Fourth Circuit, there appears this language:

> "It is to be considered also that the award of $100,000 was of hardly more value or greater encouragement for such service than an award of $50,000 would have been 10 years ago. * * * Looking at the case in the light of the award in the case of the St. Paul, comparing the awards made in various other cases, American and British, and considering the great value and great peril of the ship and cargo, the preparation for the work, the skill and dispatch of the service, the importance of time to the Kia Ora, the perishable nature of a large part of her cargo, *and the decreased value of money*,* and giving due weight to the strong opinion of the learned and experienced District Judge, the majority of this court cannot escape the clear and strong conviction that the award should be increased to $150,000."

The same appellate court below in the present case reaffirmed this doctrine. At page 103 of the Record, Judge Soper speaking for that court, said:

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* Emphasis supplied.

"The owners of the FAIRISLE contend that it was error to give weight to the depreciated value of the dollar in fixing the amount of the award. They argue that the amount of a salvage award is essentially a fraction of the value of the ship saved, and since changes in the price level affect numerator and denominator alike, the awards in the older cases truly reflect the proper percentage to award in the case at bar. This court, however, has already decided the point. It was noted in the *Kia Ora*, 4 Cir., 252 F. 507, 509, (fol. 107-108), that whatever may have been the rule in the past, the salvage award is no longer computed on a percentage basis; and the court stressed the rise in the general price level as one of its reasons for increasing the award of the District Court. The *Kia Ora, supra*, at 511."

The petitioner makes the same argument before this Honorable Court which Judge Soper rejected in the above passage. Aside from the fact that the award was not computed on a percentage basis of the value of the FAIRISLE—thus undermining the very premise of petitioner's argument namely that the respondents received the benefit of the inflated value of the FAIRISLE by the use of the percentage computation method in arriving at the award—there are other reasons why petitioner's argument is faulty. Contrary to petitioner's statement it is not at all clear that there is any such theory that a salvage award is in the nature of an award of a part interest in the salved ship. A reading of the quotation from the case of *Oelwerke Tentoria v. Erlanger & Galinger*, 248 U. S. 521, appearing on page 6 of petitioner's brief discloses this. A salvage award makes of the salving seamen creditors simply who are entitled to a lien against the salved ship to enforce their award. This is entirely different from the theory that they become part owners of the ship. If there were such a

theory, there still is no evidence in the record of any kind that the fair value of the FAIRISLE, which was stipulated to by the parties (R. 19), represented inflated value. Hence, from any view of petitioner's novel theory, there is no basis whatsoever, either on the facts or on the law, that the respondents benefited from the depreciated value of the dollar twice.

The petitioner has a dubious collateral argument to the above theory namely that the salvors received in their award the benefit of the court's consideration of the depreciated value of the dollar as of the time that the award was made instead of as of the time of the salvage. The implication is that the petitioner was prejudiced thereby although there is no statement to that effect. There is no evidence in the record of any kind that there was any difference in the amount of depreciation of the dollar between the time of the salvage and the date of the award. Even if there were a difference, this would be of no avail to the petitioner since the lower court did not use the percentage method in arriving at its award and hence the point of time at which the court considered the depreciation of the dollar should apply is immaterial so long as its award was reasonable and fair under all of the circumstances.

CONCLUSION

It is submitted that the lone question presented by the petitioner pertaining to the lower court's consideration of the depreciated value of the dollar in making its award, does not pose any special or important reason for the granting of a writ of certiorari by this Honorable Court; nor was there any ruling made in conflict with the settled law to warrant review by the United States Supreme Court.

Respectfully submitted,

I. DUKE AVNET,
Attorney for Respondents.

JOHN P. MCKINLEY,
Of Counsel.

Baltimore, Maryland,
April 13, 1949.